

STATE OF CALIFORNIA

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OFFICE OF ADMINISTRATIVE LAW

In re: )  
Request for Regulatory ) 1998 OAL Determination No. 42  
Determination filed by LOUIS )  
R. FRESQUEZ regarding a ) [Docket No. 96-010]  
memo issued by the )  
DEPARTMENT OF ) December 10, 1998  
CORRECTIONS, CALIFORNIA )  
STATE PRISON - SOLANO, ) Determination Pursuant to  
requiring inmates and their ) Government Code Section  
family and friends to consent ) 11340.5; Title 1, California  
to the disposition of ) Code of Regulations,  
unauthorized items<sup>1</sup> ) Chapter 1, Article 3  
\_\_\_\_\_ )

Determination by: EDWARD G. HEIDIG, Director

CHARLENE MATHIAS, Deputy Director  
HERBERT F. BOLZ, Supervising Attorney  
CINDY PARKER, Administrative Law Judge  
on Special Assignment  
Regulatory Determinations Program

SYNOPSIS

The issue presented to the Office of Administrative Law ("OAL") is whether a policy issued by California State Prison - Solano is a "regulation" and is therefore without legal effect unless adopted in compliance with the Administrative Procedure Act ("APA"). The policy requires inmates and senders of packages to inmates to consent in advance that all unauthorized items may be donated to charity, destroyed, or mailed home at an inmate's expense.

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OAL has concluded that the policy is a "regulation" and thus must be adopted in compliance with the APA.

## ISSUE

OAL has been requested to determine whether a form<sup>2</sup> issued by California State Prison - Solano ("Solano") which requires inmates, their family and friends to consent to the donation to charity, destruction, or mailing home at the inmate's expense of all unauthorized property contained in packages is a "regulation" required to be adopted pursuant to the APA.<sup>3</sup>

## ANALYSIS

### **I. IS THE APA GENERALLY APPLICABLE TO THE DEPARTMENT OF CORRECTIONS' QUASI-LEGISLATIVE ENACTMENTS?**

Penal Code section 5058, subdivision (a), declares in part that:

"The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons. . . . The rules and regulations *shall be promulgated and filed pursuant to [the APA]*. . . .  
[Emphasis added.]"

Clearly, the APA generally applies to the Department's quasi-legislative enactments. After this request was filed, Penal Code section 5058 was amended to include several express exemptions from APA rulemaking requirements [subdivisions (c) and (d)]. The applicability of these exemptions will be discussed below.

### **II. DOES THE CHALLENGED RULE CONSTITUTE A "REGULATION" WITHIN THE MEANING OF GOVERNMENT CODE SECTION 11342?**

Government Code section 11342, subdivision (g), defines "regulation" as:

". . . *every* rule, regulation, order, or standard of general application *or* the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by *any* state agency to implement, interpret, or make

specific the law enforced or administered by it, or to govern its procedure . . . . [Emphasis added.]"

Government Code section 11340.5, authorizing OAL to determine whether agency rules are "regulations," and thus subject to APA adoption requirements, provides in part:

"(a) *No* state agency shall issue, utilize, enforce, or attempt to enforce *any* guideline, criterion, bulletin, manual, instruction, order, standard of **general** application, or other rule, which is a [']regulation['] as defined in subdivision (g) of Section 11342, *unless* the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]. [Emphasis added.]"

In *Grier v. Kizer*,<sup>4</sup> the California Court of Appeal upheld OAL's two-part test<sup>5</sup> as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (g):

First, is the challenged rule either:

- a rule or standard of general application, *or*
- a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either:

- implement, interpret, or make specific the law enforced or administered by the agency, *or*
- govern the agency's procedure?

If an uncodified rule meets both parts of the two-part test, OAL must conclude that it is "regulation" and subject to the APA. In applying the two-part test, OAL is mindful of the principle stated by the *Grier* court:

" . . . because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead*, [1978], 22 Cal.3d at p. 204, 149 Cal. Rptr. 1, 583 P.2d 744), we are of the

view that any doubt as to the appropriateness of the APPL requirements should be resolved in favor of the APPL. [Emphasis added.]”

### Background of the Challenged Rule

Rules concerning personal property of inmates have been litigated on numerous occasions.<sup>7</sup> Rules initially appeared in 1982 in the Department’s Administrative Manual, chapter 4600.

In 1990, the Department’s various manuals, including the **Administrative Manual**, were replaced by a nine-volume compendium entitled the Department Operations Manual (“DOM”). Inmate property is covered in DOM section 54030, which is divided into several dozen subsections.

DOM Subsection 54030.15 (“Processing of Disapproved Property”) provides:

“The processing of property that inmates are not permitted to retain in their possession during incarceration shall be accomplished as follows:

- The institution shall not store inmate valuable property.
- Inmates who possess unauthorized property shall send the property home or donate it to any organization or person other than inmates or staff.
- Inmates shall sign appropriate statements, indicating their choice of disposition and agreement to the method for dispensing of their valuable property.

“Any personal property items which do not meet the criteria as established in this procedure, shall be disposed of in one of the following manners:

- Return to sender.
- Mailed out of the institution at the inmate’s expense.
- Donated to a charitable organization.
- Donated to the institution.

- Render the item useless and dispose of per DOM Section 52051 ["Disposition of Contraband"]."

In 1991, in *Tooma v. Rowland*, the California Court of Appeal ordered the Department to cease enforcement of the regulatory portions of DOM.<sup>8</sup> In this case, the Department had conceded that "much" of DOM violated the APA; the court found that "a substantial part" was regulatory.

The Department responded to *Tooma* by issuing a bulletin stating that parts of DOM could not be used until adopted pursuant to the APA.

Administrative Bulletin Number 92/2, issued January 7, 1992, provided in part:<sup>9</sup>

"The purpose of this bulletin is to notify staff and inmates that the Department Operations Manual (DOM) is still in effect. However, as the result of a recent court decision, some sections of DOM may not be used until they are processed pursuant to the Administrative Procedure Act (APA).

"Attached is a list of those DOM sections which the Department may use at this time. As the unlisted DOM sections are processed pursuant to the APA, they shall be added to the list and the updated list will be distributed. *It is anticipated that processing of all the unlisted DOM sections will be completed by June 1993.*

*"Until the unlisted DOM sections are processed, each institution and parole region shall independently implement local procedures in accordance with all applicable laws and regulations to govern those policies and procedures which are not covered by a listed DOM section."* (Emphasis added.)

DOM Subsection 54030.15 ("Processing of Disapproved Property") was not listed in the Administrative Bulletin, and, consequently was not to be used unless and until adopted pursuant to the APA.

### This Request for Determination

The subject of this request for determination is a form issued by California State Prison - Solano. The form contains the heading "California State Prison - Solano" and is entitled "Quarterly Package Authorization Form." "F.X. Chavez, Correctional Captain at CSP-Solano" is shown as the issuing officer. In three numbered paragraphs the form gives instructions regarding quarterly packages sent to inmates.

Paragraphs 1-3 provide as follows:

- "1. Packages will only be accepted using Quarterly Package Authorization Form. The address label must be placed on the outside of the package. Package must be postmarked by the last date of the quarter. Both the inmate and the sender *must sign* the address label indicating they have read and agree to all requirements. Failure to comply will result in the quarterly package being returned to the sender at the inmate's expense.
2. Only items on the Quarterly Package Form are authorized. Unauthorized items will be donated, destroyed, or returned to the sender at the inmate's expense. NOTE: Total weight of the package *must not exceed thirty* pounds. Packages exceeding *thirty* pounds will be returned to the sender.
3. A receipt must be included for all items with a value limit."

On the bottom of the form is the address label which states:

"I hereby authorize officials to donate to charity, send to my home, or destroy any and all articles which are not on the approved quarterly package list, or from an unauthorized sender. I understand that any items sent home will be at my own expense. I accept full responsibility for the contents of my package."

There are signature lines for not only the inmate recipient, but also the sender. The form in effect when this request for determination was submitted bears a revision date of March 3, 1993. OAL will refer to the agreement on the address label as the "disposition rule."

The requester contends<sup>19</sup> that inmates should not be required to agree to the disposition rule in order to receive packages, that inmates should not be required to sign away their right to receive packages in order to receive packages, and that

...also imposes stricter standards of packaging upon items received in quarterly packages than in items sold in the inmate canteen."

**A. IS THE CHALLENGED RULE A "STANDARD OF GENERAL APPLICATION?"**

The issue presented is whether the challenged policy is a "local rule" which is not subject to the APA because it does not constitute a standard of general application.

For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.<sup>12</sup>

However, a different approach is taken in the case of rules applying to prisoners. California courts have long distinguished between: (1) statewide rules and (2) rules applying solely to one prison.<sup>13</sup> In *American Friends Service Committee v. Procunier* (1973) (hereafter, "*Procunier*"),<sup>14</sup> a case which overturned a trial court order directing the *Director of the Department* to adopt *departmental* rules and regulations pursuant to the APA, the California Court of Appeal stated:

"The rules and regulations of the Department are promulgated by the Director and are *distinguished from* the *institutional rules* enacted by each warden of the particular institution affected." (Emphasis added.)<sup>15</sup>

*Procunier* is especially significant because it was this case which the Legislature in essence abrogated by adopting the 1975 amendment to Penal Code section 5058 which specifically made the Department subject to the APA. The controversy was whether the statewide Director's Rules, the rules "*promulgated by the Director*" (emphasis added), were subject to APA requirements. The Director's rules were expressly distinguished in *Procunier* from "institutional rules enacted by each warden . . . ."

OAL has consistently taken the position, based on *Procunier*, that local prison rules are not subject to the APA. Since this request was filed, the Legislature has confirmed that "local" institutional rules are not subject to the APA. Since January 1, 1995, Penal Code section 5058, subdivision (c), has declared, in part, that:

"(c) The following are deemed *not* to be 'regulations' as defined in

subdivision (c) now subdivision (e) of Section 11342 of the Government Code:

(1) Rules issued by the director or by the director's designee applying solely to a particular prison or other correctional facility, *provided that the following conditions are met:*

*(A) All rules that apply to prisons or other correctional facilities throughout the state are adopted by the director pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code [the APA].*

(B) All rules except those that are excluded from disclosure to the public pursuant to subdivision (f) of Section 6254 of the Government Code are made available to all inmates confined in the particular prison or other correctional facility to which the rules apply and to all members of the general public."  
[Emphasis added.]

This statutory language confirms that the Legislature intends for *local* prison rules to be exempt from APA adoption procedures, provided certain conditions are met.

In determining whether an alleged "local" rule of the Department of Corrections is in reality a standard of general application, OAL considers the totality of circumstances surrounding the rule. This includes consideration of the following factors: (1) whether the rule is one of statewide importance, (2) whether the rule applies at more than one correctional institution, and (3) whether the rule is required by unique circumstances at one particular correctional institution. No single factor is dispositive.

Being labeled a "local rule" by the issuing agency is not controlling. Whether a state agency rule constitutes a standard of general application does not depend solely on the official designation of the agency action. According to the California Court of Appeal: "[i]f the action is *not only of local concern, but of statewide importance*, it may qualify as a regulation despite the fact it is called 'resolutions,' 'guidelines,' 'rulings' and the like." (Emphasis added.)<sup>16</sup>

One indication of whether a particular matter should be deemed to be "of



statewide importance. Whether the Department *itself* considered the matter of statewide importance by issuing pertinent *statewide* rules, in the California Code of Regulations, the DOM, another manual such as the Administrative Manual, or an administrative bulletin.

As noted above, under "Background of the Challenged Rule," following the 1991 judicial decision striking down all regulatory portions of the DOM, the Department instructed individual institutions to "implement local procedures" on the topics covered in the invalidated DOM provisions. The Department stated that the invalidated DOM provisions were to be adopted pursuant to the APA *by June 1993*. As of the date this determination is issued in 1998, a significant number of important DOM provisions that were invalidated in 1991 have yet to be adopted pursuant to the APA,<sup>17</sup> including section 54030.15--which is one of several dozen sections governing inmate property. Other important DOM provisions that have not yet been brought into compliance with the APA include mail (section 54010), visiting (section 54020), inmate funds (section 83050), and medical services (section 83080).

Widespread use of the local rule exception is inconsistent with legislative intent to limit the use of "local rules" to specified circumstances. To allow the unlimited use of "local rules" would allow the "local rules exception" to swallow the rule requiring compliance with the APA.<sup>18</sup>

The agency response states: "The Form in question is within a warden's authority to implement," and that the duly adopted regulations contained in the Code of Regulations prescribe confiscation of unauthorized inmate property.<sup>19</sup>

OAL infers that the Department, as in earlier matters, contends essentially that the Solano rule cannot be a standard of general application because it addresses "unique" circumstances at Solano and does not apply statewide to all prisoners. The Department developed this argument at length in its agency response in 1988 OAL Determination No. 13, which concerned so-called "local rules" of the California Medical Facility ("CMF"). In this CMF matter, the Department argued that "[t]he issue now to be decided is whether certain operational procedures *unique* [to] CMF are rules of 'general application.' " (Emphasis added.)<sup>20, 21</sup> In 1988, OAL was informed by the Department that it was:

"currently in the process of reviewing all existing procedural manuals and operations plans, with the objective of (1) transferring all regulatory material

from manuals into the CCR, (2) combining all six existing manuals into a single more concise "Operations Manual," and (3) eliminating the duplicative material in the local operations plans," while retaining in these plans material concerning *unique* local conditions." (Emphasis added.)<sup>22</sup> (n. 23)

OAL agrees that certain "local rules" concern matters *unique* to particular prisons, and that these "unique" matters should not be deemed to constitute rules of "general" application for reasons stated in 1988 OAL Determination No. 13.

For an example of a unique local rule, OAL turns to the San Quentin prison library rule cited by a 1970 California Supreme Court case:

"[Rule] 14. At maximum capacity, we can only accommodate 50 men at one time; after this amount the rule is 'ONE MAN IN, AND ONE MAN OUT!!' "<sup>23</sup>

This local rule responded to "practical limitations of space,"<sup>24</sup> i.e., unique circumstances at San Quentin involving the size of the room housing the library.

The requester has submitted a form from Avenal State Prison ("Avenal"). He contends that this form demonstrates that the policy in the Solano memo is not a local rule because it applies to more than one prison.

The Avenal form is different from the Solano form in that it contains a list of items and quantities of items which inmates may receive. The Avenal form states that it is effective from "1/1/98 (sic) through 3/31/97." The language on the Solano address label and the Avenal mailing label is virtually identical<sup>25</sup> with regard to the agreement to which the inmate and sender must consent.

In 1998 OAL Determination No. 27, OAL concluded that a similar rule, mandating confiscation as the only option for disposition of unauthorized property, was in use at two prisons, Pelican Bay and Folsom. Since the confiscation rule (1) involves a topic covered by a statewide DOM provision and is of statewide importance, (2) was in use in at least two prisons, and (3) was not limited to the unique circumstances of one institution, it was, therefore, a standard of general application.

The challenged rule might have qualified for the "local rule exception" to the

APA. If, for instance, the Department had shown that (1) it was not an issue of statewide importance, (2) other institutions did not have the same rule, and (3) it was required by unique circumstances at Solano.

The rule challenged in the current determination requires inmates and all senders of packages to consent in advance that all unauthorized items may be donated to charity, destroyed, or mailed home at the inmate's expense. The rule involves a topic covered by a statewide DOM provision which has not been incorporated into the duly adopted regulations, and appears to apply throughout the state to persons who send packages to inmates. It applies to at least two prisons, Solano and Avenal. There was no showing that the rule was unique to circumstances at Solano. Therefore, OAL concludes that the challenged rule is a standard of general application.

**B. DOES THE DISPOSITION RULE INTERPRET, IMPLEMENT, OR MAKE SPECIFIC THE LAW ENFORCED OR ADMINISTERED BY THE DEPARTMENT OR GOVERN THE DEPARTMENT'S PROCEDURE?**

Because the disposition rule constitutes a standard of general application, OAL must determine whether it also satisfies the second part of the two-part "regulation" test.

Penal Code section 5058, subdivision (a), declares that

"The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons . . . ."

Penal Code section 5054 declares that

"The supervision, management and control of the State prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein are vested in the director [of the Department of Corrections] . . . ."

Until 1994<sup>26</sup>, Penal Code section 2600 provided that prisoners could be deprived of only such rights necessary "to provide for the reasonable security of the institution" and "for the reasonable protection of the public."

As of 1992, when the request for determination was filed, section 3147, Title 15, CCR provided that packages or enclosures in packages prohibited by the approved mail procedures for the facility could be disposed of, after prescribed notice to the inmate, in one of the following four ways: (1) returned to the sender, (2) mailed at the inmate's expense or the facility's expense to an outside correspondent, (3) placed in the inmate's unissued personal property; or (4) with the inmate's written consent, either destroyed or donated to a charitable organization outside the facility. With regard to packages, section 3147 provided:

“Facilities will establish and make available to all inmates procedures for the receipt of packages by inmates from their correspondents in accordance with limits set for the assigned inmate work/training incentive group. Such procedures may require an inmate to obtain prior approval to receive a package. Facilities may refuse to accept packages addressed to an inmate if prior approval has not been obtained . . . .”

Section 3138, Title 15, CCR, subsection (b), now provides that all incoming packages and mail addressed to an inmate will be opened and inspected before delivery to the inmate. The above language from section 3147 is now incorporated into section 3138. Section 3147 now provides that unauthorized items in packages which are prohibited by facility mail procedures shall be destroyed unless the inmate designates who is to receive the disallowed items within 15 days of receiving notice of the disallowed mail and authorizes withdrawal from the inmate's trust account to pay for the expense of mailing.

The agreement requiring inmates and package senders to consent to the destruction of unauthorized items mailed to the inmate *interprets* both the 1994 version of section 3147 and the current version of sections 3138 and 3147. It interprets the 1994 version of section 3147 by requiring that unauthorized items may only be returned to inmates' homes at inmate expense. It also eliminates the option contained in section 3147 of returning the package to the sender, (although the instructions above the disposition rule do not eliminate that option). The challenged rule interprets current sections 3147 and 3148 by eliminating donation to charity as an option and by eliminating the 15-day notice required by those sections.

Consequently, OAL concludes that the challenged rule requiring the donation to charity, destruction, or the mailing home at inmate expense of unauthorized items

contained in packages is a "regulation" within the meaning of the APA because it not only (1) is a rule or standard of general application, but also (2) interprets sections 5054 and 5058 of the Penal Code and provisions of the CCR. It is not a "local rule" applying solely to one particular prison, because it concerns a matter of statewide importance, it applies to more than one correctional institution, and it is not limited to the unique circumstances of one institution. Since the rule meets both parts of the two-part test, it is a "regulation" within the meaning of the APA.

### **III. DOES THE DISPOSITION RULE , WHICH HAS BEEN FOUND TO BE A "REGULATION," FALL WITHIN ANY *SPECIAL* <sup>27</sup> EXPRESS STATUTORY EXEMPTION FROM APA REQUIREMENTS?**

Penal Code section 5058, subdivision (c), added in 1995, provides that rules applying solely to a particular prison are not subject to the APA provided that *all* rules which apply to prisons throughout the state are adopted pursuant to the APA. Essentially, section 5058, subdivision (c), advises the Department of the need to abide by the APA as one of two conditions to the use of the "local rule exception."

To show that the challenged rule falls within the local rule exception the Department has made none of the following arguments: (1) the rule did not concern an issue of statewide importance, (2) other institutions did not have the same rule, and (3) the rule was required by unique circumstances at Solano.

OAL thus concludes that the rule does not fall within any special express statutory exemption from the APA.

### **IV. DOES THE DISPOSITION RULE FOUND TO BE A "REGULATION" FALL WITHIN ANY *GENERAL* EXPRESS STATUTORY EXEMPTION FROM APA REQUIREMENTS?**

Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless *expressly* exempted by statute.<sup>28</sup> Rules concerning certain specified activities of state agencies are not subject to the procedural requirements of the APA.<sup>29</sup>

#### **INTERNAL MANAGEMENT**

Government Code section 11342, subdivision (g), expressly exempts rules

concerning the "internal management" of *multistate* state agencies from APA rulemaking requirements:

"Regulation' means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any such rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, *except one that relates only to the internal management of the state agency.*" (Emphasis added.)

*Grier v. Kizer* provides a good summary of case law on internal management. After quoting Government Code section 11342, subdivision (g), the *Grier* court states:

"*Armistead v. State Personnel Board* [citation] determined that an agency rule relating to an employee's withdrawal of his resignation did not fall within the internal management exception. The Supreme Court reasoned the rule was 'designed for use by personnel officers and their colleagues in the various state agencies throughout the state. It interprets and implements [a board rule]. It concerns termination of employment, a matter of import to all state civil service employees. It is not a rule governing the board's internal affairs. [Citation.] "Respondents have confused the internal rules which may govern the department's procedure . . . and *the rules necessary to properly consider the interests of all . . . under the statutes.* . . ." [Fn. omitted.]' . . . [Citation; emphasis added by *Grier* court.]

"*Armistead* cited *Poschman v. Dumke* [citation], which similarly rejected a contention that a regulation related only to internal management. The *Poschman* court held: 'Tenure within any school system is a matter of serious consequence involving an important public interest. The consequences are not solely confined to school administration or affect only the academic community.'" . . . [Citation.][<sup>30</sup>]

"Relying on *Armistead*, and consistent therewith, *Stoneham v. Rushen* [citation] held the Department of Corrections' adoption of a numerical classification system to determine an inmate's proper level of security and place of confinement 'extend[ed] well beyond matters relating solely to the management of the internal affairs of the agency itself[,] and embodied 'a rule of general application significantly affecting the male prison

population in its custody. . . .

"By way of examples, the above mentioned cases disclose that the scope of the internal management exception is narrow indeed. This is underscored by *Armistead's* holding that an agency's personnel policy was a regulation because it affected employee interests. Accordingly, even internal administrative matters do not per se fall within the internal management exception. . . ." <sup>31</sup>

The disposition rule significantly affects inmates by preventing them from **opting** to have unauthorized property returned to senders if inmates do not have sufficient funds for such mailing. The rule also affects friends and family of inmates, who might prefer to have such property returned to them. Further, family and friends are, under the disposition rule, required to consent to donation to charity, destruction, or mailing home at inmate expense all unauthorized property as a condition of being able to mail quarterly packages to inmates. Because of these effects on both outside correspondents and inmates, OAL concludes that the disposition rule does not fall within the internal management exception. The rule does not relate solely to the management of the internal affairs of the Department.

## FORMS

OAL will next consider whether the form used for the address label falls within the form exemption to the APA.

Government Code section 11342, subdivision (g), provides in part:

"'Regulation' does not mean . . . *any form* prescribed by a state agency or any instructions relating to the use of the form, *but this provision is not a limitation upon any requirement that a regulation be adopted pursuant to this part when one is needed to implement the law under which the form is issued.*" [Emphasis added.] <sup>32</sup>

This statutory provision contains a significant restriction on the use of the "form" exception. The limits to the "form" exception have been covered in a previous determination:

"According to the leading case, *Stoneham v. Rushen*, the language quoted directly above creates a 'statutory exemption relating to *operational* forms.'

(Emphasis added.) An example of an operational form would be as follows: a form which simply provides an operationally convenient space in which, for example, applicants for licenses can write down information that existing provisions of law already require them to furnish to the agency, such as the name of the applicant.”

“By contrast, if an agency form goes beyond *existing legal requirements*, then, under Government Code section 11342, subdivision (b), a formal regulation is ‘*needed to implement the law under which the form is issued.*’ For example, a hypothetical licensing agency form might require applicants to fill in marital status, race, and religion--when none of these items of information was required by existing law. The hypothetical licensing agency would be making new law: i.e., ‘no application for a license will be approved unless the applicant completes our application form, i.e., furnishes his or her name, marital status, race, and religion.’ [Emphasis added.]”

“In other words, according to the *Stoneham* Court, if a form contains ‘uniform substantive’ rules which are used to implement a statute, those rules must be promulgated in compliance with the APA. On the other hand, a ‘regulation is *not* needed to implement the law under which the form is issued’ (emphasis added) insofar as the form in question is a simple operational form limited in scope to *existing* legal requirements.”

“In sharp contrast, the Agency Response reads section 11342 as exempting from the APA ‘any’ form prescribed by a state agency. This reading of section 11342 is too broad.”<sup>34</sup>

An interpretation of the forms language in section 11342 which permits agencies to avoid APA rulemaking requirements by the simple expedient of typing regulatory material into a form would result in the exception swallowing the rule. There would be no limit to the degree to which agencies would be able to avoid public notice and comment, OAL review, and publication in the California Code of Regulations. Read in context, and in light of the authoritative interpretation rendered by the *Stoneham* Court, section 11342 cannot be reasonably interpreted in such a way as to free agencies from all APA compliance responsibilities.

As the disposition rule is found on the address label form, but is not within the scope of existing legal requirements, it is not exempt under the forms exemption to the APA.

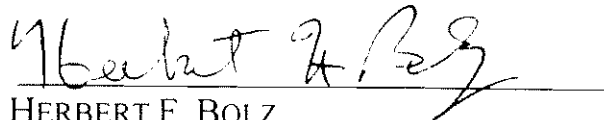


Since the disposition rule is a "regulation" within the meaning of the APA, and does not fall within any express statutory exemption, <sup>5</sup> OAL concludes that it is without legal effect until adopted in compliance with the APA.

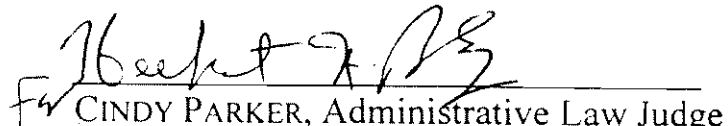
### CONCLUSION

For the reasons set forth above, OAL concludes that the challenged policy requiring inmates, their family and friends to consent to donation to charity, destruction, or mailing home at inmate expense all unauthorized personal property contained in packages is a "regulation" and thus must be adopted in compliance with the APA.

DATE: December 10, 1998

  
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Supervising Attorney

  
CINDY PARKER, Administrative Law Judge  
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Regulatory Determinations Program

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## ENDNOTES

1. This Request for Determination was filed by Louis R. Fresquez while incarcerated at California State Prison - Solano (Current address E-26812; A-2-147-L, P.O. Box 5248, Corcoran, CA 93212-5248). The agency's response was submitted by Peggy McHenry, Chief, Regulation Management Unit, Department of Corrections, 1515 "S" Street, North Building, P.O. Box 942883, Sacramento, CA 94283-0001.
2. **The requester has submitted a copy of the form which he typed rather than the form itself.**
3. According to Government Code section 11370:

*"Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing with Section 11370), Chapter 4.5 (commencing with Section 11400), and Chapter 5 (commencing with Section 11500) constitute, and may be cited as, the Administrative Procedure Act."* [Emphasis added.]

*OAL refers to the portion of the APA which concerns rulemaking by state agencies:* Chapter 3.5 of Part 1 ("Administrative Regulations and Rulemaking") of Division 3 of Title 2 of the Government Code, sections 11340 through 11359.
4. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251. A 1996 California Supreme Court case stated that it "disapproved" of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577, 59 Cal.Rptr. 2d 186, 198. *Grier*, however, is still good law, except as specified by the *Tidewater* court. Courts may cite on a particular point, cases which have been disapproved on other grounds. For instance, in *Doe v. Wilson* (1997) 57 Cal.App.4th 296, 67 Cal.Rptr. 187, 197, the California Court of Appeal, First District, Division 5 cited *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 107 Cal.Rptr. 596, on one point, even though *Poschman* had been expressly disapproved on another point nineteen years earlier by the California Supreme Court in *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 204 n. 3, 149 Cal.Rptr. 1, 3 n. 3. Similarly, in *Economic Empowerment Foundation v. Quackenbush* (1997) 57 Cal.App.4th 677, 67 Cal.Rptr.2d 323, 332, the California Court of Appeal, First District, Division 4, nine months after *Tidewater*, cited *Grier v. Kizer* as a distinguishable case on the issue of the futility exception to the exhaustion of administrative remedies requirement.

The *Tidewater* court, in discussing which agency rules are subject to the APA, referred to "the two-part test of the Office of Administrative Law," citing *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a case which quotes the test from *Grier v. Kizer*.

5. The *Grier* Court stated:

"The OAL's analysis set forth a two-part test: 'First, is the informal rule either a rule or standard of general application or a modification or supplement to such a rule? [Para.] Second, does the informal rule either implement, interpret, or make specific the law enforced by the agency or govern the agency's procedure?' (1987 OAL Determination No. 10, *supra*, slip op'n., at p. 8.)

OAL's wording of the two-part test, drawn from Government Code section 11342, has been modified slightly over the years. The cited OAL opinion--1987 OAL Determination No. 10--was published in California Regulatory Notice Register 98, No. 8-Z, February 23, 1996, p. 292.

6. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253.

7. See, for instance, *Hillery v. Rushen* (9th Cir. 1983) 720 F.2d 1132. Additional cases are cited in 1988 OAL Determination No. 13, typewritten version, pp. 10-11, CRNR 88, 38-Z, p. 2952-2953, Sep. 16, 1988.

8. *Tooma v. Rowland* (Sep. 9, 1991) California Court of Appeal, Fifth Appellate District, FO15383 (granting writ of mandate ordering Director of Corrections "to cease enforcement of those portions of the Department Operations Manual that require compliance with the Administrative Procedure Act pending proof of satisfactory compliance with the provisions of the Act," typed opinion, pp. 3-4).

Although *Tooma* is an unpublished opinion of a court of appeal, OAL may refer to it for guidance because Rule 977 of the California Rules of Court does not apply to determinations by OAL. Rule 977 prohibits *a court or a party* from citing or relying upon an unpublished opinion of a court of appeal and applies to actions or proceedings *in a court of justice* (Code of Civil Procedure, sections 21 and 22).

9. A copy of this Administrative Bulletin is attached to the Agency response filed in **1998 OAL Determination 23**. The Bulletin is signed by the Chief Deputy Director of CDC.

10. Request for Determination, p.2.

11. OAL does not have jurisdiction to address the argument that the packaging standards for items in packages is stricter than the standards for items sold in the inmate canteen.

12. *Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552. See *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).

13. See *In re Allison* (1967) 66 Cal.2d 282, 292, 57 Cal.Rptr. 593, 597-98 (rules prescribed by Director include "D2601," Rules of the Warden, San Quentin State Prison include "Q2601"); *In re Harrell* (1970) 2 Cal.3d 675, 698, n.23, 87 Cal.Rptr.

504, 518, n.23 ("Director's Rule" supplemented by "local regulation"--Holsom Warden's Rule F 2402); *In re Boag* (1973) 35 Cal.App.3d 866, 870, n. 1, 111 Cal.Rptr. 226, 227, n. 1 (contrasts "local" with "departmental" rules). See also *Department of Corrections*, 20 Ops.Cal.Atty.Gen. 259 (1952) ("the rules and regulations of the Department of Corrections *and* of the particular institution. . . .") (Emphasis added.)

14. (1973) 33 Cal.App.3d 252, 109 Cal.Rptr. 22.
15. *Id.*, 33 Cal.App.3d at 258, 109 Cal.Rptr. at 25.
16. ***Winzler & Kelly v. Department of Industrial Relations*** (1981) 121 Cal.App.3d 120, 128, 174 Cal.Rptr. 744, 747.
17. Administrative Bulletin 97/8 (May 19, 1997) includes a list of 26 DOM provisions which "may not be used."
18. See 1998 OAL Determination No. 19, p. 10, CRNR, 98, No. 37-Z, p. 19
19. Agency Response, page 1.
20. Agency Response in 1988 OAL Determination No. 13, page 4.
21. See also 1988 OAL Determination No. 13, p. 14, CRNR 88, 38-Z. Sep. 18, 1988, p. 2957 (quoting agency response to the effect that CMF rules were needed to "meet the *unique* situation at CMF.") (Emphasis added.) .
22. note 23.
23. *In re Harrell* (1970) 2 Cal.3d 675, 695 n. 16, 87 Cal.Rptr. 504, 516 n. 16.
24. *Id.*, p. 516.
25. The Solano label refers to the "Approved Quarterly Package List" while the Avenal mailing label refers to the "above approved list."
26. Penal Code section 2600 was amended to provide that prisoners in state prisons may only be deprived of rights reasonably related to legitimate penological interests.
27. All state agency "regulations" are subject to the APA unless expressly exempted by statute. Government Code section 11346. Express statutory APA exemptions may be divided into two categories: special and general. Cf. *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120,126, 174 Cal.Rptr. 744, 747 (exemptions found either in prevailing wage statute or in the APA itself). *Special* express statutory exemptions, such as Penal Code section 5058, subdivision (d)(1), which exempts Corrections' pilot programs under specified conditions, typically: (1) apply only to a portion of one agency's "regulations" and (2) are found in that agency's

enabling act. *General* express statutory exemptions, such as Government Code section 11342, subdivision (g), part of which exempts internal management regulations from the APA, typically apply across the board to all state agencies and are found in the APA.

28. Government Code section 11346.
29. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:
  - a. **Rules relating *only* to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (g).)**
  - b. Forms prescribed by a state agency or any instructions relating to the use of the form, *except* where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (g).)
  - c. Rules that "[establish] or [fix], *rates, prices, or tariffs*." (Gov. Code, sec. 11343, subd. (a)(1).)
  - d. Rules directed to a *specifically named* person or group of persons *and* which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)
  - e. Legal rulings *of counsel* issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (g).)
  - f. There is weak authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. *City of San Joaquin v. State Board of Equalization* (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest). The most complete OAL analysis of the "contract defense" may be found in 1991 OAL Determination No. 6, pp. 175-177. Like *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, **1990 OAL Determination No. 6** (Department of Education, Child Development Division, March 20, 1990, Docket No. 89-012), California Regulatory Notice Register 90, No. 13-Z, March 30, 1990, p. 496, rejected the idea that *City of San Joaquin* (cited above) was still good law.
30. *Armistead* disapproved *Poschman* on other grounds. (*Armistead, supra*, 22 Cal.3d at 204, n. 2, 149 Cal.Rptr. 1, 583 P.2d 744.)
31. (1990) 219 Cal.App.3d 422, 436, 268 Cal.Rptr. 244, 252-253.
32. Government Code section 11342, subdivision (g).
33. *Stoneham v. Rushen* (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130.

34. **1993 OAL Determination No. 5** (State Personnel Board and Department of Justice, December 14, 1993, Docket No. 90-020), California Regulatory Notice Register 94, Volume 2-Z, January 14, 1994, p.61 at 105; typewritten version at p. 266.
35. The "forms exception" language of Government Code section 11342, subdivision (g) does not apply here for the reasons discussed in **1998 OAL Determination No. 16**, pp. 10-12, CRNR 98, No. 35-Z, Aug. 1998, p. 1690, 1693-94; the confiscation rule does more than simply restate existing law in the context of an operational form.